UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

HONEYWELL TECHNOLOGY SOLUTIONS, INC.,
A DIVISION OF HONEYWELL INTERNATIONAL, INC.[1]

Employer

and **Case 28-RC-6231**

NASA PROFESSIONAL FIREFIGHTERS ASSOCIATION

Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, SUNSET LOCAL
LODGE 392, AFL-CIO

Intervenor

DECISION AND ORDER

The Petitioner seeks an election within a unit comprised of all firefighters, firefighter lieutenants, and alarm room operators employed by the Employer at its White Sands Test Facility located in Las Cruces, New Mexico.[2] The Intervenor and the Employer contend that, prior to the filing of the instant petition, they entered into a collective-bargaining agreement that constitutes a contract bar to the petition. That agreement includes employees in those classifications covered by the petition as well as guards. The Petitioner argues that a valid agreement did not exist at the time its petition was filed, because the contract was not complete and not signed by the guards' true employer, L&M Technologies. The Petitioner also argues that the ratification process was invalid, because it was not secret and was perceived by employees to be coercive. Finally, the Petitioner asserts that, even if a valid agreement existed when the petition was filed, it should not bar the election because the agreement covers a mixed unit of guards and non-guards.

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[1] The name of the Employer appears as amended here.

[2] The Petition named Honeywell Technology Solutions, Inc. (Honeywell) as the employer of the petitioned-for employees. At hearing, however, it was demonstrated that Honeywell is in fact a joint employer of the employees classified as guards, and these employees are also employed by a subcontractor of Honeywell, L&M Technologies. For purposes of clarity, I will refer to Honeywell herein as the Employer.

The Employer and the Intervenor both assert that the agreement was sufficient to create a contract bar. The Employer further contends that, pursuant to its subcontract with L&M Technologies, it had the actual authority to bind L&M Technologies. The Intervenor and the Employer further argue that the ratification process was valid. At hearing, neither the Employer nor the Intervenor addressed the issue of whether the contract's coverage of a mixed unit of guards and non-guards disqualifies the contract to serve as a bar. In its post-hearing brief, the Employer argues that Board precedent dictates that a contract bar was appropriate in this case. For the reasons noted below, I agree that the Petitioner is barred from representing employees covered under the agreement executed between the Employer and the Intervenor.

With respect to the appropriate characterization under Section 9(b)(3) of the Act of the firefighters as statutory guards, the Employer argues that security work and the protection of the Employer's property are primary job duties for the firefighters and, therefore, they are properly classified as guards. The Petitioner argues that, despite the fact that the firefighters perform certain security-related functions, these functions are incidental and not primary to their central mission of fire safety and emergency medical response. Because I find that the firefighters and alarm room operators are properly classified as statutory guards under Section 9(b)(3), it is unnecessary to address the Petitioner's argument that the Board precedent prohibits any contract bar based on an agreement covering a mixed unit of guards and nonguards.[3]

Based on the reasons set forth more fully below, I will dismiss the petition because the record in this matter supports a finding that an adequate contract existed on the petition's filing date of October 29, 2003, and that the current contract covers a unit of guards.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The Employer, Honeywell Technology Solutions, Inc., a division of Honeywell International, Inc., is a Delaware corporation, with an operation at the White Sands Test Facility (White Sands), located in Las Cruces, New Mexico, where it provides services for the National Aeronautics and Space Administration (NASA), including testing, fire protection and prevention, and site security. The parties have stipulated, and I find, that during the 12-month period ending November 13, 2003, the Employer, in the course and conduct of its business operations described above, performed services valued in excess of $50,000 for NASA. During the same period, the Employer performed services valued in

[3] Board precedent makes it clear that an agreement covering a guards-only unit will not be disturbed simply because it is made by a union that represents both guards and non-guards, such as the Intervenor. See *Burns International Detective Agency, Inc.*, 134 NLRB 451 (1961).

excess of $50,000 in States other than the State of New Mexico. The parties have stipulated, and I find, that L&M Technologies, Inc. annually provides service to the Employer valued in excess of $50,000. In these circumstances, I find that the Employer and L&M Technologies are each engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer. The Intervenor is a labor organization within the meaning of Section 2(5) of the Act and also claims to represent certain employees of the Employer.

A. The Employer's Operations

The Employer operates a test facility at White Sands. In this operation, the Employer employs approximately 23 firefighters and alarm room operators and approximately 33 security guards, as well as other employees responsible for facilities operations. These facilities operators are covered by a collective-bargaining agreement between the Employer and Local 2515 of the International Association of Machinists & Aerospace Workers and are not included in the petitioned-for unit.

The parties stipulated, and I find, that the Intervenor is a mixed guard/non-guard union as defined by Section 9(b)(3) of the Act. A collective-bargaining agreement between the Employer and the Intervenor, covering all firefighters, alarm room operators, and guards employed by the Employer and its subcontractor, L&M Technologies, at White Sands was in place from October 28, 2000 to October 28, 2003. At hearing, the business agent for the Intervenor, Marion Duryea, testified that the Intervenor and Employer have had a stable bargaining relationship since 1974, with successive agreements and no breaks in between agreements.

B. The Unit Definition

The Employer's and Intervenor's collective-bargaining agreement defines the current bargaining unit as:

> White Sands Test Facility Program Assurance Department: Those employees in the collective bargaining unit, engaged in WSTF fire protection and prevention, and site security for the National Aeronautics and Space Administration, U.S. Government programs at the White Sands Test Facility, New Mexico, and its remote locations, that were certified by Dynalectron Letter N71-1519, dated 29 August 1974, excluding those office clerical employees who are secretaries to Department Managers and the Program Manager….

As more fully developed below, I find that the Employer's and Intervenor's agreement which covers a guard unit consisting of firefighters, lieutenants, alarm room operators, security guards, and security guard lieutenants employed by the Employer and its

subcontractor, L&M Technologies, at White Sands, but excluding all other employees, fire department managers, fire department managers, and supervisors as defined in the Act, is an appropriate unit.

C. The Employer's Subcontract with L&M Technologies

At hearing, several witnesses testified that the guards at White Sands were, in fact, employed by a company called L&M Technologies. The record evidence, however, indicates that the Employer's predecessor, Allied Signal, with which the Employer merged in 1999, entered into a contract with L&M Technologies, whereby L&M Technologies agreed to provide security services to Allied Signal at White Sands. That subcontract states:

> [Allied Signal] reserves the right to negotiate a common agreement between any and all unions and each member of the team. [Allied Signal] shall be the sole negotiator and shall be responsible for interpretation of all Collective Bargaining Agreements (CBA) for represented employees under this Subcontract. [L&M Technologies] agrees to defer to [Allied Signal] and accept all terms and conditions in Collective Bargaining Agreements negotiated by [Allied Signal]. [Allied Signal] shall be responsible for day-to-day interface with representatives of the local union. [Allied Signal] will seek consultation and contribution from [L&M Technologies] in regard to negotiation and interpretation of the Collective Bargaining Agreements.

Only two pages of the subcontract were introduced into evidence, but the Employer's contract administrator for White Sands, Billy Lawrence, testified that these pages were taken from a much lengthier contract between the Employer and L&M Technologies that covered the work performed by the guards at White Sands. A representative of L&M Technologies was present at the hearing, but did not make a formal appearance for the record. However, the parties stipulated, and I find, that L&M Technologies is not the employer of the firefighters in the petitioned-for unit. Rather, the firefighters are employed solely by the Employer.

D. The 2003 Contract Negotiations and Ratification Vote

The record reflects that Duryea and Gary Schick, the Employer's Manager of Labor Relations, met on Monday, October 20, 2003, and on Tuesday, October 21, 2003, each time for a full day, during which time they negotiated numerous revisions to the expired contract between the Employer and the Intervenor. Both Schick and Duryea testified that, as each item was negotiated, they would sign off on a tentative agreement with the understanding that, until all matters were resolved, these tentative agreements would not become finalized. On October 21, Schick extended the Employer's last and final offer, which was orally accepted by the Intervenor, but with the understanding that now all the tentative agreements that they had signed off on would be agreed to. According to Schick, "the understanding was that everything that we had signatures on at that point was finalized." Schick testified that L&M Technologies did not participate in the negotiations or sign off on the agreement, but that the negotiations were undertaken in compliance with the subcontract between the Employer and L&M Technologies.

The agreement that emerged from the negotiations stated that its wage provisions would not be effective absent ratification, and the parties understood the agreement to be subject to ratification. After the conclusion of the meeting, representatives of both the Employer and the Intervenor jointly assembled a "packet" describing the terms agreed upon for presentation to the Intervenor's membership. On about October 24, 2003, a meeting was held among the membership and a ratification vote taken. The record evidence indicates that the agreement ratified differed in format from the parties' initialed, tentative agreements, but that any substantive differences were minor. The only substantive differences between the drafts were that the parties' initialed agreement failed to include a revised dues check-off provision (merely stating "insert new form"), and the agreement ratified by the membership failed to include an addendum Memorandum of Understanding regarding the red-circling of two employees.

At hearing, two firefighters testified that they were uncomfortable during the ratification vote, because there were "supervisors" present and they felt compelled to vote at a table in the center of a small room while others looked on. The record also indicates, however, that the ballot box was located in a corner of the room, where the employees were able to vote, and at least one firefighter admitted that he could have voted privately. Two of the four firefighters who testified indicated that two different shades of color were used for the ballots. However, the record appears to be inconclusive, because they could not affirm that there was an actual division between balloting for the two guards and the firefighters. Finally, the record shows that the employees identified as "supervisors" present during the vote were actually lieutenants who are bargaining unit members and were present to vote.

On October 24, 2003, Duryea called Schick and told him that the contract had been ratified by the Intervenor. He confirmed the same by a letter to Schick. Schick testified that he did not receive this letter before October 30, 2003, and that he did not sign the final agreement in full form before October 28, 2003. The instant petition was filed on October 29, 2003.

E. The Duties of the Firefighters and Alarm Room Operators

The firefighter witnesses testified that they perform daily tasks related to fire prevention. These include fire prevention, including issuing burn permits; responding to fire alarms, emergency medical and hazardous materials calls; fire suppression; building walk-throughs to check for fire safety issues; and maintenance on firefighting equipment. Firefighters wear uniforms distinct from that of the security guards, and while they are issued a badge, they do not wear their badges except on formal occasions.

Firefighters are required to maintain a security clearance and receive training in firearms and deadly force when they are hired. They take refresher courses in these subjects at least twice per year. They also receive annual workplace violence training, in which they are taught non-violent crisis intervention techniques. They are each issued a firearm and are informed during the interview process that they are required to maintain a license to carry a firearm as a condition of employment. Some of the firearms assigned to the firefighters are

kept at the security gate and others are stored in the building where the firefighters and alarm room operators are housed. The requirement that the firefighters maintain a weapons certification is contained in the collective-bargaining agreement. That agreement also states that the Employer is obligated to provide the firefighters with firearms training and certification. The job description for firefighters also specifies that they must maintain a current firearm certification and that they will be required to carry a firearm.[4] Firefighters are licensed to perform security work under New Mexico law.

Firefighters work in a 24-hour shift, and engage in three walk-throughs per shift, two of which take place between 4 p.m. and 8 a.m. During that time, the firefighters' only other duty is being on-call for emergencies. During the nightly walk-throughs, firefighters check for fire hazards, make sure doors are locked, check that employees working after hours are wearing proper identification badges, and check the parking lots for unidentified vehicles. The firefighters' chief has sent the firefighters e-mail messages, reminding them to attend to various security issues during these walk-throughs, including checking that doors are locked, checking for vehicle hazards, and restricting personnel access. Two firefighters testified that if they encountered an individual who was not wearing proper identification, they would question the employee and ask for their badge. One firefighter testified that if he spotted an unfamiliar vehicle on the premises after hours, he would follow up on this, because, in a worst-case scenario, it could be an indication of a terrorist action.

In the event of a major security incident such as a terrorist action, the firefighters also serve as a contingent security force at White Sands. The White Sands Emergency Preparedness Plan states that, "[d]uring times of emergency, Security and ES personnel[5] will be called upon to expand their operations." Several witnesses testified that the firefighters are necessary for back-up security, because White Sands is located in a remote area which local law enforcement authorities could not be expected to reach in less than 30 minutes. The Employer's Security Supervisor and Facility Security Officer testified that this back-up security function is the reason that the firefighters are certified to carry, and are issued, weapons.

The supervisor for the alarm room operators testified that these employees provide emergency medical service dispatch and monitor the facility's main gate via a closed-circuit television. It is also anticipated that they will be responsible for monitoring an upcoming intrusion-detection system. Alarm room operators also relay requests for security back up to the security guards and relay reports of security breaches to the security department. About 15 to 20 guns are stored in the dispatch area in which the alarm room operators work. Alarm room operators also follow up on firefighters' reports of vehicles left at the facility after hours by running the license plate numbers and calling the owner of the vehicle to determine why the car has been left.

F. Legal Analysis and Determination

[4] At hearing, firefighters testified that they had recently been instructed by their supervisors that they no longer had to carry their weapons. However, none of the firefighters could identify a particular individual who had issued this instruction and at least one firefighter admitted that he had not in fact received such an instruction.

[5] "ES Personnel" stands for Emergency Services personnel, which refers to the firefighters.

One of the core rights that accrues from a collective-bargaining relationship between a union and an employer is expressed in the contract-bar doctrine. This doctrine is aimed to protect and encourage stability in the parties' bargaining relationship over the duration of a reasonable contract term. *American Dyewood Co.*, 99 NLRB 78, 80 (1952). Under this doctrine, the Board will dismiss a petition for an election in a unit that is covered by an existing collective-bargaining agreement. The Board has considerable discretion in the formulation and application of the contract-bar rule, *Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 853-54 (9th Cir. 1980), and it may waive or apply the rule to further its underlying policy. *NLRB v. Circle A&W Products Co.*, 647 F.2d 924, 926 (9th Cir. 1981). Based upon the case law and reasoning set forth below, I find that a valid agreement was in place on October 29, 2003, when the petition was filed. Therefore, under the contract bar doctrine, the Petitioner may not seek an election with respect to the employees covered by that agreement for a term of three years.[6]

The Petitioner argues that the contract asserted here as a bar is not adequate for several reasons: (1) a final agreement had not been signed by the parties at the time the petition was filed; (2) L&M was not signatory to any agreement; (3) the contract ratification required for a final agreement was "tainted" by coercive circumstances surrounding the ratification vote; and (4) even if an adequate contract existed between the Employer and the Intervenor on the date the petition was filed, it cannot operate as a bar, because no collective-bargaining agreement between the Employer and the incumbent covering the guards and the firefighters could constitute a bar under the Board's decision in *Corrections Corp. of America*, 327 NLRB 127 (1999). I will address each of these arguments in turn.

1. "Finality" of the Agreement

As noted, the contract bar doctrine exists for the purpose of affording contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time granting the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. Accordingly, the burden of proving that a contract constitutes a bar to a representation election is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). The required elements are set forth in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). In order to meet the threshold inquiry of the contract bar doctrine, the agreement must be written, signed before the rival petition is filed, contain the substantial terms and conditions of employment, encompass the employees involved in the petition, and cover an appropriate unit. Id.; *Seton Medical Center*, 317 NLRB 87 (1995).

In *Seton Medical Center*, 317 NLRB 87 (1995), the Board held that, "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the

[6] The agreement entered into by the Employer and the Intervenor is actually four years in duration, but its bar will be effective for only the first three years of its term. See *Dobbs International Services, Inc.*, 323 NLRB 1159, 1160 (1997) (contract in excess of three years duration may serve as a bar to a petition only for the first three years of its term).

terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing their signatures." Therefore, in order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements, which have been well established by Board case law.

The agreement need not be embodied in a formal document. An informal document or series of documents, such as a written proposal and a written acceptance, which nonetheless contain substantial terms and conditions of employment, are sufficient if signed. *De Paul Adult Care Communities*, 325 NLRB 681 (1998), citing *Seton Medical Center*, supra, *Appalachian Shale Products, Co.*, supra, and *Georgia Purchasing*, 230 NLRB 1174 (1977). The Board modified the *Appalachian Shale Products* contract-bar rule slightly in *Gaylord Broadcasting Co. d/b/a Television Station WVTV*, 250 NLRB 198 (1980). The Board held that a contract proposal that had been initialed by the parties on each of its 39 pages to indicate agreement, clearly identifying the parties to the contract, and signifying in writing that they had agreed to the contract provisions contained therein, was sufficient to establish substantial terms and conditions of employment and would serve as a bar to an election. *Appalachian Shale Products Co.*, supra at 199.

The Petitioner takes issue with the form of the agreement asserted here as a bar, arguing that it does not constitute a "final" agreement signed by the parties. However, the undisputed testimony establishes that both Schick and Duryea, who tentatively agreed upon each term as they negotiated it, considered that all tentatively agreed-on terms would become finally agreed upon when the Intervenor accepted the Employer's final proposal. The parties' initials on this final proposal, therefore, were intended to function as an "overall settlement" incorporating all of the prior tentative agreements into a final agreement. The fact that the tentative agreements are not signed with full signatures does not render the contract bar doctrine inoperable; the parties' initials on each page of their agreement may constitute a sufficient "signature" for contract-bar purposes. *Gaylord Broadcasting*, 250 NLRB 198, 199 (1980).

The Board has held that the purposes of the contract-bar rule are met where the parties signed numerous tentative agreements, followed by a signed agreement that "incorporated by specific reference the signed and dated tentative agreements for the individual issues previously resolved." See *St. Mary's Hospital*, 317 NLRB 89, 90 (1995). On the other hand, where no signed document indicates the totality of the parties' agreement, the Board will not allow tentative agreements to support a bar. See *Seton Medical Center*, supra at 88. The Intervenor's October 24, 2003 letter to the Employer, which set forth the wage rates under the new contract and indicated that the Intervenor had ratified the "packet" of agreements the Intervenor and the Employer had jointly prepared, served as a signed acceptance of the overall settlement reached by the parties. This process is sufficient for contract-bar purposes.

2. L&M Technologies' Failure to Sign the Agreement

The Petitioner asserts that L&M Technologies' failure to sign the agreement nullifies it for purposes of the contract bar doctrine. However, under its subcontract with the Employer, L&M Technologies expressly agreed to be bound by the terms and conditions of

any collective-bargaining agreement negotiated by the Employer with the collective-bargaining representative of its employees, thereby giving the Employer the authority to negotiate and reach agreement on its behalf. See *Diversified Services, Inc. d/b/a Holiday Inn of Ft. Pierce*, 225 NLRB 1092 (1976**)** (finding *Appalachian Shale Products* standard met where employer's attorney signed contract proposal that was accepted by union). By agreeing to be bound by the final contract, the Employer, acting as the designated agent during negotiations, effectively bound L&M Technologies to that contract as it related to the guards.[7] Where employers allocate the responsibility for negotiating and executing a collective-bargaining agreement with a union, and the non-signatory employer agrees to be bound by any terms agreed upon by the signatory employer, both employers are bound to the agreement. See, e.g., *Great Atlantic & Pacific Tea Co.*, 197 NLRB 922, 922 (1972) (successor employer may assume a collective-bargaining agreement by "express written agreement").

3. The Ratification Process

At hearing, the Petitioner elicited testimony that the agreement ratified by the membership differed in form from the draft agreed to by the Schick and Duryea. The record indicates, however, that these changes were in form only, and an examination of the two drafts indicates that the only actual differences between the drafts were minor. In order to serve as a bar, an agreement must contain "substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship." Thus, it is not required that the agreement "delineate completely every single one of its provisions in order to qualify as a bar." *St. Mary's Hospital*, 317 NLRB at 90 (quoting *USM Corp.*, 256 NLRB 996 (1981)). Here, the insertion of certain contract language regarding dues check-off and the omission of an addendum Memorandum of Understanding regarding the wages of two employees are the only things that distinguish the membership-ratified terms from those agreed upon by Schick and Duryea. The record is inconclusive as to whether there was a meeting of the minds with respect to these two minor issues, but even assuming there was not, this is not enough to threaten the stability of the bargaining relationship, and, therefore, does not invalidate the contract as a bar. See *St. Mary's Hospital*, 317 NLRB at 90 (failure to make agreement on manner in which wages were expressed, retiree health benefit adjustments, employee choice of primary physician and designation of clinic hours, not enough to invalidate bar).

The alleged distinctions between the membership-ratified agreement and that reached by Schick and Duryea are without effect in any event, because ratification by the membership was not required. Where a collective-bargaining agreement expressly makes ratification a condition precedent to the contract's validity, the contract will be ineffectual as a bar, unless it is ratified prior to the filing of a rival petition. However, if the contract itself contains no express provision for prior ratification, prior ratification is not a condition precedent, and the contract will bar an election in the absence of ratification. *Appalachian Shale Products*, supra at 1163. In a similar vein, absent express language in the agreement requiring ratification by the membership itself, "ratification" means ratification by the Intervenor. See *United Health*

[7] Although the subcontract was entered into by AlliedSignal, not Honeywell, the merger of the two companies in 1999, effectively caused Honeywell to "step into the shoes" of AlliedSignal with respect to its rights and duties under the subcontract.

Care Services, 326 NLRB 1379 (1998) (parties' understanding that contract would not take effect until ratified by union membership does not prevent bar, in the absence of express requirement in contract). Accordingly, the Intervenor's ratification, not the allegedly "tainted" membership vote, was required to make the wage provisions of the agreement effective.

The Petitioner's attempt to challenge the contract ratification procedure does not compel a different conclusion. The Board has long held that contract ratification votes and procedures are "internal union affairs upon which an employer is not free to intrude." *Armored Transport, Inc*., 339 NLRB No. 50, slip op. at 5 (2003) (citing *London Chop House, Inc*., 264 NLRB 628, 629 (1982)); *Newtown Corporation*, 280 NLRB 350, 351 (1986); *Childers Products Company*, 276 NLRB 709 (1985). Moreover, allegations of coercion, failure to follow balloting procedure, or other improper conduct during contract ratification are not subject to the Board's jurisdiction, but are properly brought under the Labor-Management Reporting and Disclosure Act. *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984) (finding no National Labor Relations Act violation based on allegations that employees were deprived of meaningful vote by lack of adequate notice and information regarding subject matter and nature of vote). However, even assuming that these allegations were within the Board's jurisdiction, I am of the view that the Petitioner has failed to adduce any convincing evidence supporting them. The testimony regarding different colored ballots was inconclusive, at least one firefighter admitted that he could have voted privately and another firefighter admitted that the "supervisors" allegedly present during the ratification vote were in fact lieutenants, properly included within the bargaining unit, who were there to vote.

4. The Classifications of the Firefighters and Alarm Room Operators as Statutory Guards Under Section 9(b)(3)

Finally, I address the Petitioner's argument that, even assuming that an adequate agreement between the Employer and the Intervenor was in place at the time the Petitioner filed its petition, it cannot operate as a bar because the unit covered by the agreement is a "mixed unit" of guards (the security guards) and non-guards (the firefighters and alarm room operators). This argument is based on Section 9(b)(3) of the Act, sometimes referred to as the "guard exclusion," which contains prohibits the Board from finding appropriate a mixed unit of guards and nonguards.[8] Guards are defined by the Act as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the

[8] Section 9(b) of the Act states, in pertinent part:

> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards. 29 U.S.C. § 159(b)(3) (emphasis added).

employer or to protect the safety of persons on the employer's premises." National Labor Relations Act, 29 U.S.C. § 159(b)(3).

The legislative history of Section 9(b)(3) of the Act indicates that the separation of guards from other employees for the purposes of collective bargaining was intended to avoid conflicting loyalties and to ensure an employer that it could have a core of plant protection employees in the event of industrial unrest. *Lion Country Safari*, 225 NLRB 969 (1976); *McDonnell Aircraft Corporation*, 109 NLRB 967, 969 (1954). The Board has stated that in determining whether employees are guards, it is primarily concerned with the nature of the employees' duties and that employees are guards if they are charged with "guard responsibilities" that are not a minor or incidental part of their overall responsibilities. *The Boeing Company*, 328 NLRB 128, 130 (1999). The Board has defined guard responsibilities as those typically associated with traditional police and plant security functions such as: (1) the enforcement of rules directed at other employees; (2) the authority to compel compliance with those rules; (3) training in weapons and security procedures; (4) possession of weapons; (5) participation in security rounds or patrols; (6) monitoring and controlling access to the employer's premises; and (7) wearing guard-type uniforms or displaying other indicia of guard status. *The Boeing Co*., supra; see also *Wolverine Dispatch, Inc*., 321 NLRB 796, 798 (1996); *55 Liberty Owners Corp*., 318 NLRB 308, 310 (1995); *Rhode Island Hospital*, 313 NLRB 343, 346 (1993). Based on an application of these factors to the record before me, I find that the enforcement of security and safety rules is an essential, and not a minor or incidental, part of the firefighters' and the alarm room operators' overall responsibilities. Thus, I find that employees in each classification are guards under Section 9(b)(3) of the Act.

Petitioner argues that the facts of this case are analogous to those of *Boeing Company*, 328 NLRB 128 (1999), in which the Board found a group of firefighters not to be guards. In the *Boeing* case, the record evidence indicated that, while the firefighters' "walk-throughs," had increased in frequency during a strike, they remained largely fire and safety related in nature. In addition, the *Boeing* firefighters received no firearms and no training in the use of physical force or self-defense techniques. Finally, it was undisputed that, although they were originally instructed to detain and question unfamiliar individuals on the company premises, this duty was later revised to merely reporting suspicious persons to security officers, after the firefighters expressed concern that they felt "'uncomfortable'" performing such security-related functions. In contrast to the firefighters in *Boeing*, here the firefighters' main duty for 16 hours of their 24-hour shift is to patrol the facility, checking for both fire and security issues. Firefighters are made aware at the time they are hired that certifying for a firearm is a job requirement and that they could be terminated for refusing to carry a weapon. They testified that they considered it their job duty to confront individuals who lacked proper identification, to handle workplace violence situations, and to track down the owners of suspicious vehicles. The *Boeing* decision stands for the proposition that firefighters, whose sole security-related function is to report suspicious activity, will not be found to be guards. See 328 NLRB at 128 (rejecting proposition that "a reporting function alone, without other significant security-related responsibilities, could confer guard status"). As the record evidence in the matter before me amply demonstrates that the White Sands firefighters have security responsibilities beyond a mere reporting function, *Boeing* is not controlling here. Compare *Burns International Security Services*, 300 NLRB 298, 300 (1990), enfd. denied 942

F.2d 519 (8th Cir. 1991), where the Board rejected guard status where firefighters carried no weapons, did not monitor the plant gates, and were expected to report all suspicious conduct to their supervisors.

The Regional Director for the Region 7 recently found guard status properly conferred in *DaimlerChrysler Corp.*, Case 7-RC-22449 (Oct. 24, 2003), a case involving similar facts. In *DaimlerChrysler*, fire safety specialists conducted patrols of their employer's premises to check for both security and fire safety issues; were also responsible for taking action if the employer's "code of conduct" was violated; and received training in emergency response, homeland security, and conflict resolution. The Regional Director found that safety and security was an "essential part" of the employees' responsibilities, and not minor or incidental to their fire protection responsibilities. Here, the duties and responsibilities of the White Sands firefighters are similar, but are even more compelling where they are issued weapons and expected to act as "first responders" in the event of a major security breach.

With respect to the alarm room operators, their primary duties are to monitor the entrance gate and act relay calls to the security officers and firefighters. I agree with the Intervenor that the Board's decision in *MGM Grand Hotel* is controlling as to these employees. See 274 NRLB 139 (1985). In that case, the Board found guard status was properly conferred on a group of unarmed operators who were responsible solely for monitoring a security system and relaying information to security officers and firefighters. Although the operators performed no physical duties or rule enforcement activities, they were guards, the Board found, because it was their primary duty to keep the employer's property safe. The alarm room operators in this case perform almost identical functions to the *MGM Grand* operators, and, therefore, I find them properly classified as guards.

The record amply establishes that the firefighters enforce rules regarding proper identification and location of vehicles on the Employer's premises, possess the authority to compel compliance with those rules, have training in security procedures, firearms training and the use of deadly force, are required to be certified in firearms and carry firearms, participate in security rounds or patrols, and are expected to provide back-up security in the event of a large-scale security breach. The alarm room operators monitor access to the Employer's premises and act as a dispatch service for security-related reports. In these circumstances, I find that these duties are an essential part of the firefighters' and alarm room operators' responsibilities and are not in either case a minor or incidental part of the overall fire protection and emergency medical response responsibilities of their positions. Thus, I find that they are guards under Section 9(b)(3) of the Act. In these circumstances, I find that Petitioner's reliance on *Corrections Corp. of America*, 327 NLRB 127, to be inapposite, since I have concluded that the contract unit involved, in essence, is a guard unit and not a mixed unit of guards and non-guards.

In sum, I conclude that the reasons asserted by Petitioner for the proposition that no contract bar should be found are, based the record evidence and law, not persuasive, and that the contract between the Employer and the Intervenor serves as a bar to the petition. Accordingly, I shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein, be, and hereby is, dismissed.

REQUEST FOR REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by December 22, 2003. A copy of the request for review should also be served on the Regional Director for Region 28.

DATED at Phoenix, Arizona, this 8th day of December 2003.

/s/Michael J. Karlson
Michael J. Karlson, Acting Regional Director
National Labor Relations Board – Region 28

401-2575-2800
401-2575-2850
401-2575-2875